U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 10 January 2007

CASE NO.: 2005-LHC-2158

OWCP NO.: 07-170192

IN THE MATTER OF:

M. T.[1]

Claimant

v.

NORTHROP GRUMMAN SHIP SYSTEMS, INC./AVONDALE DIVISION,

Employer

APPEARANCES:

ANDREW HORSTMYER, ESQ. and
BECKY URRUTIA, ESQ.

For The Claimant

FRANK J. TOWERS, ESQ.

For The Employer

Before: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq., (herein the Act), brought by Claimant against Northrop Grumman Ship Systems, Inc./Avondale Division, (Employer).

[1] Pursuant to a policy decision of the U.S. Department of Labor, the Claimant's initials rather than full name are used to limit the impact of the Internet posting of agency adjudicatory decisions for benefit claim programs.

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, Notice of Hearing was issued scheduling a formal hearing on April 17, 2006, in Covington, Louisiana. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Claimant offered 36 exhibits, Employer/Carrier proffered 16 exhibits which were admitted into evidence along with one Joint Exhibit. As some of Claimant's exhibits were not numbered, citations below include page numbers representing the location of the page in the exhibit. This decision is based upon a full consideration of the entire record.[2]

Post-hearing briefs were received from the Claimant and the Employer/Carrier. Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. STIPULATIONS

At the commencement of the hearing, the parties stipulated (JX-1), and I find:

1. That the Claimant was injured on April 14, 2004.

2. That Claimant's injury occurred during the course and scope of her employment with Employer.

3. That there existed an employee-employer relationship at the time of the accident/injury.

4. That the Employer was notified of the accident/injury on April 14, 2004.

5. That Employer/Carrier filed a Notice of Controversion on April 24, 2004, and October 15, 2004.

6. That an informal conference before the District Director was held. (Tr. 26).

[2] References to the transcript and exhibits are as follows: Transcript: Tr.___; Claimant's Exhibits: CX-___; Employer's Exhibits: EX-___; and Joint Exhibit: JX-___.

7. That Claimant received temporary total disability benefits from June 18, 2004 through July 5, 2004 at a compensation rate of $331.33 for 2 weeks.

9. That some medical benefits for Claimant have been paid pursuant to Section 7 of the Act.

II. ISSUES

The unresolved issues presented by the parties are:

1. Causation; subsequent fall, injury to back.

2. The nature and extent of Claimant's disability.

3. Whether Claimant has reached maximum medical improvement.

4. Claimant's average weekly wage.

5. Entitlement to medical care and services.

7. Attorney's fees, penalties and interest.

III. STATEMENT OF THE CASE

The Testimonial Evidence

Claimant

Claimant was deposed by the parties on November 28, 2005 and testified at formal hearing. (Tr. 36; EX-13, p. 1).

After completing high school (Tr. 38), Claimant earned a degree in cosmetology, and worked as a self-employed licensed cosmetologist until 1990. (Tr. 37-38, 70; EX-13, pp. 10-11). Claimant then worked as a security guard and sergeant from 1996 until May 2000. (Tr. 39; EX-13, pp. 23-24). She also worked at a Texaco station as an assistant manager. (Tr. 40, 71).

Claimant earned an associate's degree in computer electronics from ITT Tech in November 2002. (Tr. 69-70; EX-13, pp. 10-11, 19). She was employed by Employer on March 10, 2003, as an electronic technician, where she remained on the date of accident. (Tr. 41, 70; EX-13, p. 14).

Claimant testified that she has attempted to return to work twice since her injury. (Tr. 65). She worked for two or three weeks for Macy's in December 2004, as a seasonal sales person in the men's department. (Tr. 66). During this employment, she experienced a lot of pain in her knee. (Tr. 67). Claimant testified that customers would stand and talk to her at the register so she did not have to move, because they could see that she was in pain. (Tr. 67). Macy's did not offer Claimant a full-time job after the season ended. (Tr. 67, 73). Claimant testified that she would not classify her job performance at Macy's as adequate, but she was not fired as a result of her performance. (Tr. 73).

Claimant's last employment was at a Shell gas station, after Christmas 2004. She quit after a few days because she could not perform the duties of cleaning and climbing a ladder to fill the ice bin. (Tr. 37-38, 65-66). Claimant has had no employment since leaving Shell about January 2005. (Tr. 74).

In August 2003, Claimant twisted her left ankle while performing work for Employer. (Tr. 41-42). As a result, she was treated at Ochsner Medical Center, received physical therapy, and performed light duty work. (Tr. 41; EX-13, pp. 36-37). The ankle apparently resolved and Claimant returned to regular duty work without missed time. (Tr. 42; EX-13, p. 39).

Claimant sustained another injury on April 14, 2004. (Tr. 44). She testified that it had rained and there were puddles of rainwater about the ship. (Tr. 42-43). She slipped on steps as she was proceeding to her assigned work area, twisting her left ankle and landing on her left knee. (EX-13, p. 33).

Claimant's supervisor, Sherry Hymen, witnessed the accident. (Tr. 43; EX-13, p. 34). Because Claimant did not feel pain immediately, she proceeded with her supervisor to a regularly scheduled safety meeting. (Tr. 43). Claimant's knee began aching, and after the meeting she presented to Employer's first aid station. (Tr. 43; EX-13, pp. 34-35). The first aid unit sent Claimant to the "light duty" building where she worked for 56 days. (Tr. 44; EX-13, p. 42).

Claimant presented to Dr. Charles Johnson, an orthopedic specialist, who prescribed physical therapy. (Tr. 45-46; EX-13, p. 45). She was still in pain after the therapy. (Tr. 46; EX-13, p. 66). However, Dr. Johnson released her to return to full duty work. (EX-13, p. 50).

Upon return to full duty, Claimant had significant pain and reported to Employer's first aid, who told her to go back to her doctor. (Tr. 47). Claimant returned to Dr. Johnson who told her there was nothing more he could do for her. (Tr. 47). Claimant stated she did not have confidence in Dr. Johnson thereafter because she knew she "wasn't imagining the pain." (EX-13, p. 50).

Claimant testified that Dr. Johnson referred her to Dr. Treuting for a second opinion. She began treating with Dr. Treuting in 2005 prior to Hurricane Katrina. (Tr. 48; EX-13, p. 53). Dr. Treuting is an ankle specialist. He referred Claimant to Dr. Meyers for her knee problems. (Tr. 48; EX-13, p. 55).

Dr. Treuting ordered an MRI of Claimant's ankle and physical therapy. (Tr. 48; EX-13, p. 54). Claimant testified that after completion of therapy, she continued to have pain in her leg, back, and ankle when consistently on her leg. (Tr. 49). Claimant testified she did not have back pain prior to her work-related injury. (Tr. 68).

Claimant also complained of her back, which Dr. Treuting stated he could not treat. (Tr. 49). Dr. Treuting prescribed a cane, which Claimant secured through Employer's workman's compensation insurance. (Tr. 49-50). Dr. Treuting suggested she see another doctor for her back, and stated he could not do anything further for her ankle. (Tr. 50). Dr. Treuting referred Claimant to Dr. Eissa who further treated her ankle and knee. (Tr. 51).

When Dr. Treuting could do nothing further, Claimant went to Dr. Sellards, an orthopedic specialist with LSU, Kenner Regional Medical Center, using her private health insurance. (Tr. 54-55; EX-13, p. 51). Claimant testified Dr. Sellards told her that her injury was of the type experienced by athletes and unless properly treated, it would get worse. (Tr. 54). Dr. Sellards recommended physical therapy about August 2004, which was eventually accomplished under Dr. Meyer. (Tr. 55).

Claimant first treated with Dr. Meyer for her knee in April or May 2005. (Tr. 52, 53). She testified Dr. Meyer ordered x-rays and showed her on a computer where the cartilage in her knee was damaged. (Tr. 52-53). He first prescribed physical therapy which failed to provide relief. Claimant was then given three injections which helped for a while. The pain later returned, but to a lesser degree than prior to the injections.

(Tr. 53). Dr. Meyer opined the next step after injections was surgery. (Tr. 53).

Claimant is no longer treating with any doctor except Dr. Meyer whom she saw a couple of months prior to formal hearing. (Tr. 51-52). Claimant testified that Dr. Meyer was supposed to schedule another MRI of her knee, but she does not know if he has received approval for the procedure. (Tr. 52).

Claimant was briefly examined by Dr. Katz. (Tr. 55). Dr. Katz did not inform Claimant about his opinion of her condition. (Tr. 56-57).

Claimant applied for jobs listed on a vocational rehabilitation report prepared by Mr. Nebe dated March 9, 2006. (Tr. 56-57, 63). Prior to March 2006, Claimant had not applied for employment since leaving the Shell station in January 2005. (Tr. 63, 74).

Claimant testified that she wants to go back to work. (Tr. 74). When asked why she has not looked for work since leaving the job at Shell, Claimant stated that if she sits too long, she must walk around, and if she stands too long, she is in pain. (EX-13, p. 74).

Claimant applied in person for a loss prevention camera operator position at Dillard's department store on March 13, 2006. (Tr. 58-59, 63). Claimant was told that the job had been filled. (Tr. 60).

The following day, March 14, 2006, Claimant applied for several positions. (Tr. 60-63). She applied in person at National Optic Warehouse for an optician trainee position, LaPlace Travel Center, and L & R Security Service for a security guard position. (Tr. 60-62). Claimant made follow-up calls, but has not been contacted. (Tr. 62). Claimant called the Boomtown Casino and was directed by their human resource department to fill out a job application on the internet. She did this, but has not heard anything from Boomtown. (Tr. 62).

Claimant was contacted by Will Staffing, a temporary agency, in response to a resume she posted on Monster.com. (Tr. 75, 77). Claimant was asked to come in and fill out a job application for a technician job repairing equipment such as pool tables and video poker machines. She filled out an application the same day. (Tr. 81). In response to questions on the application, Claimant revealed her knee, ankle, and back

problems. (Tr. 82). She was told to come back when she was "all the way healed," but she could not do the job right now. (Tr. 75, 82).

Claimant testified she is not capable of performing some of the jobs listed on the vocational report, such as a gas station job. (Tr. 75). However, other jobs, such as the ones at Dillard's, National Optical Warehouse, and LaPlace Travel Center, Claimant would attempt to do if she could secure them. (Tr. 76). Claimant believes she is capable of performing the security guard job at L & R if it were offered to her. (Tr. 77).

Since her work accident, Claimant was injured when her knee "gave out," causing her to fall and cut her left heel. (Tr. 68). Claimant presented to the emergency room at Kenner Regional Medical Center and received thirteen stitches. (Tr. 68). Claimant testified she felt like she lost control of the knee. (Tr. 69). Claimant reported the fall to Drs. Treuting, Meyers, and Eissa. (Tr. 69).

In July 2005, Claimant's car contacted another vehicle, but she stated that she was not injured as a result of the accident. (EX-13, p. 31).

Claimant presently washes her own clothes, occasionally cooks, and performs some routine household chores. (Tr. 79). Prior to the accident, Claimant worked in her garden, cut grass, scrub the bathroom, and played with her dogs in her backyard. She can no longer perform these tasks. (Tr. 85).

Claimant's Son

Claimant's son who is 22-years old, testified at formal hearing. (Tr. 88). He stated he presently resides with Claimant and works during the day. (Tr. 88, 92).

He testified that prior to her accident, Claimant worked in the yard doing such tasks as weeding the garden, moving bricks, mulching, and watering the lawn. (Tr. 88-90). However, she does not presently perform any of those tasks. (Tr. 90). He testified that Claimant is also unable to perform some indoor functions that she performed prior to the accident, such as changing light bulbs, hanging pictures, scrubbing the bathrooms, and going into the attic. (Tr. 90-91).

He stated Claimant is limited in what she can do; some days her knee is better than on other days. Some days she can mop, do laundry and cook. (Tr. 42).

Claimant's Second Son

Claimant's second son who is 18-years old, testified at formal hearing. (Tr. 94). He resides with Claimant and attends school. (Tr. 94, 97).

He testified that since her accident, Claimant does not attend his football games in the colder months because the cold affects her knees. (Tr. 95). He stated Claimant no longer plants flowers and weeds her garden, which she did before the accident. (Tr. 96). That work is now done by him and his brothers. (Tr. 96).

The Medical Evidence

Dr. Charles Johnson

Dr. Charles Johnson, a board-certified orthopedic surgeon, was deposed by the parties on March 9, 2006. (EX-15, pp. 1, 5). Claimant initially presented to Dr. Johnson on April 22, 2004. (EX-15, p. 6). She complained of problems with her left knee and left ankle after she slipped and fell down stairs at work. (EX-15, p. 6). Claimant stated she had previously injured both the ankle and knee at work. (EX-15, p. 7).

Upon physically examining Claimant, Dr. Johnson opined that she had a contusion to her patella. (EX-15, p. 8). He also observed a "mild pop" in Claimant's left knee indicating a possible defect on the underside of the patella. (EX-15, pp. 8-10). Dr. Johnson opined that the knee symptoms he observed were related to Claimant's fall on April 14, 2004. (EX-15, p. 10). Dr. Johnson also diagnosed "anterior drawer instability" and "inverse instability" of the left ankle. (EX-15, pp. 8-9).

Dr. Johnson opined Claimant's ankle instability pre-existed her fall on April 14, 2004. (EX-15, p. 10). He further opined that Claimant's knee and ankle complaints were the result of aggravation to the pre-existing conditions by the April 14, 2004 injury. (EX-15, p. 34).

Dr. Johnson initially prescribed two weeks of physical therapy and light duty work, with no climbing or lifting. (EX-15, pp. 8, 12).

Dr. Johnson testified Claimant's next visit was on May 11, 2004. (EX-15, p. 13). Claimant conveyed she was still in pain and had not been to physical therapy due to a clerical problem. (EX-15, p. 13). Claimant next presented to Dr. Johnson on May 25, 2004, at which time she had began physical therapy. The therapist recommended three additional weeks, to which Dr. Johnson agreed. (EX-15, p. 14).

Claimant next presented to Dr. Johnson on June 21, 2004. (EX-15, p. 15). Dr. Johnson stated Claimant reported pain in her foot and knee. She stated that the physical therapy had not really helped her. (EX-15, p. 15). Dr. Johnson testified that the physical examination did not reveal anything that warranted Claimant's symptoms, so he recommended an MRI of both the knee and ankle. (EX-15, pp. 15-16).

The MRI of Claimant's knee revealed only chondromalacia. (EX-15, p. 19). Dr. Johnson testified that to a medical probability, Claimant's chondromalacia was aggravated by her fall in April 2004. (EX-15, p. 20). He testified that the MRI did not show arthritis. (EX-15, p. 34). Dr. Johnson opined that the original patella contusion could trigger the development of arthritis. (EX-15, p. 36). The MRI of Claimant's ankle reported a possible strain of the posterior talofibular ligament, which Dr. Johnson thought was an "over reading" of the MRI. (EX-15, p. 18).

Dr. Johnson testified that on July 1, 2004, he reviewed the results of Claimant's MRI with her. (EX-15, pp. 21-22). He told her that he had nothing else to offer her from a surgical standpoint, and that she should make an effort to return to work. If she could not, she could get a second opinion. (EX-15, p. 22). Dr. Johnson released Claimant to return to work in a full duty capacity. (EX-15, p. 22).

Claimant again presented to Dr. Johnson on July 15, 2004. (EX-15, p. 23). She stated that when she went back to work, she had massive swelling about the ankle and knee, and had sought care at the Ochsner hospital emergency room. (EX-15, p. 23). At that time, Dr. Johnson found no swelling of either area, and Claimant had a full range of motion. (EX-15, p. 24). Dr. Johnson testified that if Claimant had experienced swelling upon return to work, he would connect it to the aggravation resulting from the original injury of April 2004. (EX-15, p. 33). However, he found no evidence of swelling. (EX-13, p. 32).

Dr. Johnson stated he was at a loss to explain Claimant's symptoms. He referred her to Dr. Treuting, a foot and ankle specialist, for a second opinion. (EX-15, p. 24). Dr. Johnson was still of the opinion that Claimant could return to work in a full duty capacity. (EX-15, pp. 25-26). Dr. Johnson opined that Claimant had reached maximum medical improvement on July 15, 2004, at least with regard to his treatment of her. (EX-15, pp. 26-27). He stated it was his opinion that the aggravation which occurred to Claimant's chondromalacia had resolved. (EX-15, p. 29).

Dr. Johnson testified that he has not seen Claimant since her visit on July 15, 2004, and he had since retired and closed his practice. (EX-15, p. 27).

Dr. Johnson stated he had no reason to doubt the truthfulness of Claimant's subjective complaints. (EX-15, p. 28). He stated that Claimant informed him about light duty work available at Employer which was unusual, and which he found admirable. (EX-15, p. 28). Dr. Johnson observed that most workman's comp patients did not want to work at all, even at light duty capacity. (EX-15, pp. 29-30).

Dr. Robert Treuting

Dr. Robert Treuting is a board-certified orthopedic surgeon, and was deposed by the parties on January 30, 2006. (EX-16, pp. 1, 5).

Dr. Treuting testified he first examined Claimant on March 17, 2005. (EX-16, p. 6). She presented with complaints of left ankle pain. Dr. Treuting noted Claimant walked with a limp and had a knee problem, but he did not examine her knee. (EX-16, p. 11). Upon physical examination, Claimant had hypersensitivity to palpation, which Dr. Treuting felt was out of proportion with objective findings. (EX-16, p. 12).

At this examination, Claimant brought an MRI which was done in June 2004. (EX-16, pp. 8-10). Since Dr. Treuting was at a loss to explain Claimant's pain based on his physical examination, he ordered another MRI to compare with the older one. (EX-16, pp. 10, 13). The second MRI of Claimant's ankle was performed on April 7, 2005.

Dr. Treuting again saw Claimant on April 14, 2005. (EX-16, p. 16). No abnormalities were found in the second MRI. (EX-16, p. 17). Dr. Treuting explained the results to Claimant and

recommended physical therapy to strengthen the ankle. (EX-16, pp. 18-20). In response to Claimant's inquiries about nerve injections, Dr. Treuting suggested she see a physical medicine rehab doctor. He told Claimant that he had nothing else to offer. (EX-16, p. 21).

Dr. Treuting released Claimant to unrestricted work on April 14, 2005. He opined that she had reached maximum medical improvement with regard to her ankle injury on that date. (EX-16, pp. 19-20).

Claimant again presented to Dr. Treuting on January 5, 2006. (EX-16, p. 22). She stated she was still having problems with her left ankle, and complained of back pain. (EX-16, pp. 22-23, 32). Claimant had received stitches for a laceration to her left heel and reported a burning pain, which Dr. Treuting attributed to the laceration. (EX-16, p. 23). Dr. Treuting testified that Claimant's subjective complaints with regard to palpation of her foot were again out of proportion to his objective findings. (EX-16, p. 25).

Dr. Treuting suggested Claimant consult Dr. Eissa regarding her back pain. (EX-16, p. 33). Dr. Treuting also supplied a prescription for a "single prong walking cane," which he did not recall prescribing at deposition. (CX-I; EX-16, p. 34).

Dr. Treuting stated he saw nothing to change his opinion regarding maximum medical improvement as of April 14, 2005, and Claimant's ability to return to work without restriction. (EX-16, p. 26). He explained to Claimant that he had nothing further to offer. (EX-16, p. 26).

Dr. Treuting has not seen Claimant since January 5, 2006, and has no planned follow-up. (EX-16, p. 27). He opined that Claimant's ankle does not have a structural problem and her [work-related] injury is not the cause of her current pain. (EX-16, p. 28).

Regarding the truthfulness of Claimant's complaints of pain, Dr. Treuting testified "I never like to say I don't believe somebody . . . but based on my expertise . . . her symptoms did not correlate with my physical findings and the imaging study." (EX-16, p. 27). He also testified that his observations did not mean that Claimant was not, in fact, in pain. (EX-16, p. 31).

Dr. Mark Meyer

Dr. Mark Meyer, a board-certified orthopedic surgeon specializing in general orthopedic surgery and tumors, was deposed by the parties on January 25, 2006. (EX-14, pp. 1, 5, 10).

Claimant initially presented to Dr. Meyer on April 25, 2005, for a third opinion regarding her left knee. (EX-14, p. 6). Dr. Meyer testified he examined Claimant's knee, finding she had pain over the "pes anserine insertion" and most significantly a positive "patella grind test". (EX-14, pp. 9, 11). A positive patella grind test indicates tendonitis, which is inflammation where the muscle attaches to the bone. (EX-14, pp. 11-12). Tendonitis is typically caused by overuse. (EX-14, p. 12). He also reviewed radiographs that indicated mild arthritic changes in the knee. (EX-14, p. 12). Dr. Meyer stated that arthritis in a woman of Claimant's age is uncommon, but not unusual. (EX-14, p. 13).

Dr. Meyer diagnosed mild arthritis and patellofemoral chondromalacia, a softening of the cartilage under the kneecap, which is a degenerative condition. (EX-14, pp. 14-15). Dr. Meyer's plan for treatment was physical therapy and light duty work, with restrictions on climbing, kneeling, and squatting. (EX-14, p. 15).

Claimant next presented on May 25, 2005, reporting about 25 percent improvement. (EX-14, p. 17). Dr. Meyer recommended continued physical therapy, work restrictions, and medication. (EX-14, pp. 18-19).

At Claimant's next visit on June 20, 2005, Dr. Meyer determined that Claimant's improvement from physical therapy had plateaued. He recommended a series of three Synvisc injections. (EX-14, p. 22). Dr. Meyer testified that Claimant had not reached maximum medical improvement at that point, and his recommendation regarding work remained unchanged. (EX-14, p. 23).

Dr. Meyer next saw Claimant on July 6, 2005, for her third Synvisc injection. (EX-14, p. 24). Claimant had experienced significant improvement from the first two injections. (EX-14, p. 24). Dr. Meyer released Claimant to full duty work on that date. (EX-14, p. 25).

Claimant again presented on December 8, 2005. She still had current pain, but it was improved from that which she experienced prior to the injections. (EX-14, p. 26).

Dr. Meyer stated at deposition that his diagnosis and opinion regarding Claimant's return to full duty work remained unchanged. (EX-14, pp. 26-27). He assigned August 1, 2005, as the date of maximum medical improvement for Claimant's knee. (EX-14, p. 29). Dr. Meyer stated that if further treatment were warranted, he would recommend repeating the Synvisc injections. (EX-14, p. 28).

Dr. Meyer stated he is not surprised by Claimant's continued complaints of pain. He stated a fall directly on the front of the knee or kneecap creates a significant compressive force that may result in cartilage damage that cannot be seen by normal x-rays or MRI. (EX-14, pp. 41-42).

Dr. Meyer opined that if Claimant's pain started directly after her fall on the front of her knee, the incident could have aggravated or caused chondromalacia because of injury to cartilage in the kneecap. (EX-14, p. 30). Chondromalacia can also develop without injury. However, given the timing of Claimant's symptoms in relation to her injury, Dr. Meyer opined it is more probable than not that Claimant's symptoms are attributable to her fall. (EX-14, pp. 30-31).

Dr. Meyer opined that Claimant's condition does not cause instability of the knee. (EX-14, p. 42). However, weakness of the quadriceps can cause feelings of instability. (EX-14, pp. 42-43). If someone does not do activity because of knee pain, it can lead to weakness of the quadriceps. (EX-14, pp. 43-44). Dr. Meyer has no documentation that he found quadriceps weakness in Claimant. (EX-14, p. 44). Based on a review of his records and his independent recollection, Dr. Meyer would not attribute Claimant's fall because her knee "gave out" to any of the pathologies he detected in her left knee. (EX-14, p. 46).

Dr. Meyer stated he does not perform impairment ratings, and therefore could not assign a percentage of disability with regard to Claimant's left knee. (EX-14, p. 33).

Since Dr. Meyer's deposition, Claimant presented on February 22, 2006 with complaints of a "burning" type pain over the lateral aspect of her knee. Dr. Meyer recommended an MRI of the knee noting "If the MRI shows some degenerative changes of the meniscus only, I would disregard this. If the MRI shows a

clear-cut meniscal tear, particularly laterally, we may need to investigate further with arthroscopy." (CX-E, p. 32).

Dr. Ralph Katz

Dr. Ralph Katz was deposed by the parties on March 8, 2006, and rendered a report of his medical evaluation dated February 22, 2006. (CX-HH, p. 1; CX-L, p. 387). Dr. Katz is a board-certified orthopedic surgeon, with sub-specialties in trauma and spine. (CX-HH, pp. 5-6). Dr. Katz examined Claimant on February 22, 2006, at the request of Employer, at which time she complained of ankle and knee pain. (CX-HH, pp. 6-7, 11).

Dr. Katz reviewed some of Claimant's medical records, and the depositions of Drs. Meyer and Treuting. (CX-HH, p. 7). He also explored Claimant's medical history directly with her. (CX-HH, p. 10). He stated he had no reason to question or doubt the history or complaints conveyed to him by Claimant. (CX-HH, p. 20). Claimant had a history of knee pain, but was not having pain at the time of her accident on April 16, 2004. (CX-HH, p. 10).

Dr. Katz took x-rays of Claimant's left knee and ankle. (CX-HH, p. 13). The x-ray of her knee revealed "mild degenerative changes in the medial compartment," and "very minimal degenerative changes in the ankle." (CX-HH, p. 13). He opined the changes in the knee are the result of "wear and tear," which is arthritis. (CX-HH, p. 14). The arthritis in Claimant's knee and ankle was noted by Drs. Treuting and Meyer. (CX-HH, p. 15). Dr. Katz stated arthritis is an age-related condition that he opined probably existed prior to Claimant's accident. (CX-HH, p. 16).

After physically examining Claimant, Dr. Katz diagnosed chronic ankle pain for the past year, "mild discomfort in palpation over the perineal tendons and anterior talar fibular ligament." Claimant's knee had "patella pain syndrome with chondromalacia, and some mild patella tendonitis." (CX-HH, p. 18). He recommended physical therapy, ice and anti-inflammatory drugs for Claimant's symptoms. (CX-HH, pp. 17-18).

Dr. Katz observed degenerative changes in Claimant's knee and chondromalacia, a softening of cartilage. (CX-HH, p. 22). Chondromalacia is usually caused by wear and tear or degenerative arthritis. (CX-HH, p. 26). It can also be caused by trauma. (CX-HH, pp. 26-27). He stated that it is not possible to distinguish whether chondromalacia in a specific

knee was caused by trauma or wear and tear. (CX-HH, p. 27). Trauma can bring on the onset of arthritic development. (CX-HH, p. 27). Arthritis pain can also recur with or without further injury. (CX-HH, pp. 42-43).

Dr. Katz reviewed the records of Drs. Meyers, Treuting, and Johnson, Dr. Katz. (CX-HH, pp. 16-17, 20). His conclusions are based on the timing of Claimant's complaints and treatment. (CX-HH, pp. 21, 39).

Claimant was injured in April 16, 2004. She had another episode of pain when she attempted a return to work in July 5, 2005. (CX-HH, pp. 37-38). Based on his review of the records, Dr. Katz found no complaints of pain by Claimant between April 2005 and July 2005, nor did he find any treatment received by Claimant from April 2005 through December 2005. (CX-HH, pp. 20-21, 39). Dr. Katz opined that doing daily activity such as walking around would have precipitated pain in Claimant's knee during this interval of time, even if the knee was not "being tested" by work activity. (CX-HH, pp. 41-42).

Based on this gap in time between Claimant's complaints of pain, Dr. Katz concluded that she was injured, treated, apparently improved, and returned several months later with complaints of pain. (CX-HH, p. 21). Dr. Katz opined that Claimant's arthritis pre-existed her injury of April 14, 2004. (CX-HH, p. 46). He further opined that Claimant's accident on April 14, 2004, aggravated her arthritis but the aggravation resolved in mid-2005. (CX-HH, pp. 16-17, 20). Dr. Katz concluded that Claimant's present light duty status is not the result of her injury on April 14, 2004. (CX-HH, pp. 21-22).

Dr. Katz acknowledges the intervention of Hurricane Katrina on August 29, 2005. (CX-HH, p. 22). Dr. Katz further opined that if Claimant had "had continued complaints of pain from April, May, June, July where she saw a physician and it's documented, then I would say it's probably related (to the April 14, 2004 accident)." (CX-HH, pp. 49-50). Dr. Katz stated that if Claimant had continued treatment with Dr. Meyer from the time period when she was injured without any gaps greater than two months all the way through July 2005, he would agree the July 2005 symptoms were a continuation of symptoms related to the April 2004 accident. (CX-HH, p. 58).

Claimant did not tell Dr. Katz that she had a back problem. (CX-HH, p. 45). He noted Claimant was using a cane favoring her left extremity, and has an antalgic gait. (CX-L, p. 388). Dr.

Katz agrees that a patient may strain the lower back after a knee or ankle injury, especially if the patient limps. (CX-HH, p. 44).

Dr. Katz stated at deposition his examination of Claimant did not reveal anything that would cause him to disagree with the opinions of Drs. Meyer and Treuting, who released Claimant to return to full duty work. (CX-HH, pp. 59-60). However, Dr. Katz testified he believes Claimant is presently capable of light duty and recommended a functional capacity evaluation to determine if she was capable of more. (CX-HH, p. 21).

Dr. Katz stated in his medical evaluation that Claimant's knee "may benefit from another series of Synvisc injections and/or continued quadriceps strengthening, as Dr. Meyer had recommended." He recommended ankle strengthening exercises and anti-inflammatories for Claimant's ankle. (CX-L, p. 389).

Dr. Robert Sellards

Only the medical records of Dr. Sellards are included in the record. (CX-C). Claimant presented to Dr. Sellards on August 20, 2004, with the MRIs of her ankle and knee which were taken approximately July 2004. (CX-C, pp. 1, 3). Dr. Sellards noted the MRI of Claimant's ankle indicates that she had a sprain of her posterior talofibular ligament and the MRI of her knee "shows that she has some patellar chondromalacia." (CX-C, p. 3).

Dr. Hazem Eissa

Only the medical records of Dr. Eissa are included in the record. (CX-D). Claimant was referred to Dr. Eissa by Dr. Treuting. (EX-3, p. 15).

Claimant presented to Dr. Eissa on June 1, 2005. (CX-D, p. 15; CX-E, p. 20). Dr. Eissa lists the reason for the referral as "to see if there is any kind of nerve block that may help." He prescribed Lipoderm patches and a knee stimulator, and light duty work. (CX-D, p. 16; CX-E, p. 21). He also noted "patient states she depressed from [sic] not work [sic] and cannot cut grass." (CX-E, p. 22).

Dr. Eissa signed a Work Status Summary dated May 30, 2005. (CX-E, p. 55). The preprinted Work Status Summary form defined light work as "lifting 20 lbs. maximum with frequent lifting and/or carrying of objects weighing up to 10 lbs. Even though

the weight lifted may be only a negligible amount, a job is in this category when it requires walking or standing to a significant degree, or when it involves sitting most of the time with a degree of pushing and pulling of arm and/or leg controls." Dr. Eissa checked this status without adding additional restrictions under the "comments" section, and listed a diagnosis of "left knee and ankle pain." (CX-E, p. 55).

Claimant again presented on July 14, 2005, and January 17, 2006. (CX-E, pp. 27, 31). Dr. Eissa noted on January 17, 2006, Claimant was having back pain that has occurred since she was limping. He noted that he told her it was probably secondary to the limping. His assessment was "left knee DJD (degenerative joint disease) and pain, lower extremity pain, lower back pain secondary to antalgic gait." (CX-E, p, 31). Dr. Eissa also noted that Claimant stated the knee stimulator and Lidoderm were helping her knee. (CX-E, p. 31).

On November 30, 2005, R. S. Medical, the supplier of the electronic stimulator for Claimant's knee, wrote that the charge was denied by the workman's compensation carrier. (CX-J, pp. 1, 3).

Other Medical Evidence

Other medical records including physical therapy notes from Alton Ochsner Medical Foundation, and Kenner Regional Medical Center records regarding the laceration to Claimant's heel were included in record and were reviewed. (CX-E; CX-K). Also included is evidence that Claimant presented to Ochsner Hospital emergency room with complaints of "pain in the left knee and ankle" on July 7, 2004 at 9:36 p.m. (CX-E, p. 59).

Physical therapy notes covering the period of April 28, 2005 through August 6, 2005, were reviewed. (CX-E, pp. 33-54). Therapist Dennis Romig noted on June 3, 2005, "decreased balance in SLS [single leg stance] evident upon observation today." (CX-E, p. 49).

The Vocational Evidence

Michael Nebe

Mr. Nebe, a licensed vocational consultant working for FARA, testified at formal hearing and rendered a Vocational Report dated March 9, 2006. (Tr. 98-99; EX-18).

Mr. Nebe testified that he was not allowed to meet with Claimant, and his report is based upon medical records and copies of depositions of Claimant's doctors supplied by the FARA adjuster. (Tr. 100-101). Mr. Nebe considered the depositions as medical records, and may not have reviewed the actual medical records of the deposed physicians. (Tr. 130). He was also supplied with information regarding Claimant's geographical location, work history, and educational background. (Tr. 102) Mr. Nebe considered the documents supplied to him to be sufficient to render an opinion. (Tr. 101-102, 143-145).

Claimant was treated by various doctors. Drs. Meyer and Treuting released Claimant to full duty, while Dr. Eissa released her to light duty. (Tr. 103). Mr. Nebe's report does not mention Claimant's use of a cane, although he was aware that a cane was prescribed for her. (Tr. 131-132). He stated he felt it was "up to the doctor . . . and he did not indicate a cane was anything that was a hindrance." (Tr. 133). Mr. Nebe noted reading in Dr. Treuting's deposition that Claimant's prescription for a cane would not have changed his (Dr. Treuting's) release for Claimant to return to work without restrictions. (Tr. 149). Since the medical reports did not specify limits on standing, walking, lifting, kneeling, or alternating of positions, no such limitation of Claimant's physical ability was considered. (Tr. 150-152).

Mr. Nebe summarized his findings regarding Claimant's work restrictions in the vocational report as "permanent restrictions of light duty with no climbing, per Dr. Eissa to no restrictions and full duty work releases from Drs. Johnson, Treuting and Myers." (EX-18, p. 2).

Mr. Nebe testified he performed a transferable skills analysis of Claimant's past jobs. (Tr. 105; CX-M, p. 3). Claimant's job of electronics tech was classified as "medium duty" which is outside of her present restriction by Dr. Eissa. (Tr. 106). Mr. Nebe stated he identified several other job categories that matched up to Claimant's other transferable skills. (Tr. 106). He then did a labor market survey, personally contacting each potential employer, to identify jobs that existed for which Claimant was qualified. (Tr. 107-108). It is Mr. Nebe's professional opinion that these jobs are appropriate for Claimant. (Tr. 108). He stated that if all relevant information was provided in the reports given to him, the report would be unaffected by his inability to personally meet with Claimant. (Tr. 108-109).

Regarding Claimant's attempt to secure the jobs listed, Mr. Nebe stated it appears that she applied, and some potential employers were considering her for positions. (Tr. 110). He has not followed-up with those employers after generating the report to determine if any of the jobs were still available. (Tr. 110). He has no evidence corroborating Claimant's testimony that she applied for the jobs. (Tr. 110). Two jobs listed in prior reports prepared by another consultant were identified as appropriate for Claimant, and were available between July and August 2005. (Tr. 111-112). All positions identified are classified as light duty or sedentary, and are commensurate with Claimant's medical reports. (Tr. 118).

Mr. Nebe concluded that jobs available in March 2006, which were appropriate for Claimant, paid between $6.00 and $15.00 per hour. (Tr. 112). Jobs available in 2005 paid between $6.25 and $6.50 per hour, and were entry level positions. (Tr. 113).

The morning of the formal hearing, Mr. Nebe located two additional jobs which he opined are appropriate for Claimant. (Tr. 113-114). The first is a security guard/officer position at the Audubon Institute paying $7.00 to $10.00 per hour. (Tr. 114-115). That job is classified as light, and requires record keeping, monitoring, patrolling the grounds on foot and in a vehicle, and crowd control activity. (Tr. 115). It is Mr. Nebe's opinion that Claimant could apply for and have a reasonable expectation of obtaining this position. (Tr. 115).

Also identified on the day of hearing were security positions with Inner Parish Security. (Tr. 116). Entry level pay was $10.00 per hour which can increase to $15.00 or more depending on the interview. (Tr. 117).

Mr. Nebe was also asked to look back to 2004, which he did using other reports. (Tr. 119). He identified jobs in March 2004, May 2004, and 14 electronics technician jobs at Employer between June 29, 2004 and September 1, 2004. As of September 1, 2004, six of those jobs were still available. (Tr. 119). In Mr. Nebe's opinion, according to the medical testimony of Dr. Johnson, who released Claimant to full duty, Claimant could have performed the electronic technician jobs. (Tr. 120).

Mr. Nebe's Vocational Report dated March 9, 2006, list the following jobs as suitable for Claimant and available in the relevant community. (EX-18, pp. 4-6).

1. Loss prevention camera operator for Dillard's department store was available in March 2006. Duties include operating a surveillance camera to monitor various departments throughout the store. The position is full-time and the salary range is $6.00 to $8.00 per hour. (EX-18, p. 4).

2. Optician Trainee position with National Optical Warehouse was available in March 2006. Duties include fitting, dispensing, and fabricating eyewear. Full-time and part-time positions were available, and the wage range is $6.00 - $10.00 for full time-work. Employer preferred customer service experience. (EX-18, p. 4).

3. Cashier/clerk at LaPlace Travel Center was available in March 2006. Duties include receipt of payments and other duties in a convenience store/truck stop. The position is full-time with a salary of $7.50 per hour. (EX-18, p. 4).

4. Security guard (armed and unarmed), with L&R Security Service; full-time positions were available in March 2006. Duties include patrolling and monitoring premise, completion of reports, and contacting authorities if necessary. The salary range is $13.00 - $15.00 per hour. (EX-18, p. 5).

5. Surveillance operator trainee for Boomtown Casino; full-time position was available in March 2006. Duties include monitoring using electronic and video equipment, recording information and completion of daily reports. The salary range is $8.00 to $10.00 per hour. (EX-18, p. 5).

6. Cashier position at the Aquarium of the Americas was available in July or August 2005. Duties include accepting payments and issuing tickets to customers. The salary for this position is $6.25 per hour and it is full-time. (EX-18, p. 5).

7. Parking booth attendant at New South Parking System was a full time position, available in July or August 2005. Duties include accepting payments from parking customers at an airport parking garage. The wage is $6.50 per hour. (EX-18, p. 6).

The Contentions of the Parties

Claimant contends that she has not yet reached maximum medical improvement from her compensable injury, that she remains temporarily totally disabled, and is entitled to benefits from April 14, 2004 to present and continuing. She further contends that her fall in June 2005, and back pain are causally related to her compensable injury. Average weekly wage should be properly calculated under Section 10(a).

Employer contends that Claimant sustained a scheduled disability, limiting her benefits to those specified by Section 8(c) of the Act, and she was able to return to full-duty work in July 2004. Therefore, Claimant is not entitled to compensation benefits beyond those already paid. Alternatively, Employer contends that it has demonstrated suitable alternative employment. Employer further contends that Claimant's fall in June 2005, and allegations of back pain, were not causally related to the compensable injury. Average weekly wage is properly calculated using Section 10(c) criteria at $368.54.

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J. B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), aff'g. 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Duhagon v. Metropolitan Stevedore Company, 31 BRBS 98, 101 (1997); Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 551 F.2d 898, 900 (5th Cir. 1981); Bank v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

It is also noted that the opinion of a treating physician may be entitled to greater weight than the opinion of a non-treating physician under certain circumstances. Black & Decker Disability Plan v. Nord, 538 U.S. 822, 830, 123 S.Ct 1965, 1970 n. 3 (2003)(in matters under the Act, courts have approved adherence to a rule similar to the Social Security treating physicians rule in which the opinions of treating physicians are accorded special deference)(citing Pietrunti v. Director, OWCP, 119 F.3d 1035 (2d Cir. 1997)(an administrative law judge is bound by the expert opinion of a treating physician as to the existence of a disability "unless contradicted by substantial evidence to the contrary")); Rivera v. Harris, 623 F.2d 212, 216 (2d Cir. 1980)("opinions of treating physicians are entitled to considerable weight"); Loza v. Apfel, 219 F.3d 378 (5th Cir. 2000)(in a Social Security matter, the opinions of a treating physician were entitled to greater weight than the opinions of non-treating physicians).

A. The Compensable Injury

Section 2(2) of the Act defines "injury" as "accidental injury or death arising out of or in the course of employment." 33 U.S.C. § 902(2). Section 20(a) of the Act provides a presumption that aids the Claimant in establishing that a harm constitutes a compensable injury under the Act. Section 20(a) of the Act provides in pertinent part:

> In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary- that the claim comes within the provisions of this Act.

33 U.S.C. § 920(a).

The Benefits Review Board (herein the Board) has explained that a claimant need not affirmatively establish a causal connection between his work and the harm he has suffered, but rather need only show that: (1) he sustained physical harm or pain, and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. Kelaita v. Triple A Machine Shop, 13 BRBS 326 (1981), aff'd sub nom. Kelaita v. Director, OWCP, 799 F.2d 1308 (9th Cir. 1986); Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140 (1991); Stevens v. Tacoma Boat Building Co., 23 BRBS 191 (1990).

These two elements establish a **prima facie** case of a compensable "injury" supporting a claim for compensation. Id.

1. Claimant's Prima Facie Case

The parties stipulated that Claimant suffered a compensable injury on April 14, 2004, which Claimant contends did not resolve. Additionally, Claimant suffered a fall on June 8, 2005, and alleges back and leg pain which she contends are causally related to the compensable injury.

Although Claimant's complaints occurring after the stipulated compensable injury are relevant to Employer's rebuttal of causation and a determination of nature and extent of disability, in this case subsequent complaints are not relevant to the **prima facie** case. The compensable injury alone, as stipulated, is sufficient to invoke the Section 20(a) presumption.

Thus, based on stipulation of the parties, Claimant has established a **prima facie** case that she suffered an "injury" under the Act, having established that she suffered a harm or pain on April 14, 2004, to her left ankle/knee, and that her working conditions and activities on that date could have caused the harm or pain sufficient to invoke the Section 20(a) presumption. Cairns v. Matson Terminals, Inc., 21 BRBS 252 (1988).

2. Employer's Rebuttal Evidence

Once Claimant's **prima facie** case is established, a presumption is invoked under Section 20(a) that supplies the causal nexus between the physical harm or pain and the working conditions which could have caused them.

The burden shifts to the employer to rebut the presumption with substantial evidence to the contrary that Claimant's condition was neither caused by his working conditions nor aggravated, accelerated or rendered symptomatic by such conditions. See Conoco, Inc. v. Director, OWCP [Prewitt], 194 F.3d 684, 33 BRBS 187 (CRT)(5th Cir. 1999); Gooden v. Director, OWCP, 135 F.3d 1066, 32 BRBS 59 (CRT)(5th Cir. 1998); Louisiana Ins. Guar. Ass'n v. Bunol, 211 F.3d 294, 34 BRBS 29(CRT)(5th Cir. 1999); Lennon v. Waterfront Transport, 20 F.3d 658, 28 BRBS 22 (CRT)(5th Cir. 1994). "Substantial evidence" means evidence that reasonable minds might accept as adequate to support a conclusion. Avondale Industries v. Pulliam, 137 F.3d 326, 328

(5th Cir. 1998); Ortco Contractors, Inc. v. Charpentier, 332 F.3d 283 (5th Cir. 2003) (the evidentiary standard necessary to rebut the presumption under Section 20(a) of the Act is "less demanding than the ordinary civil requirement that a party prove a fact by a preponderance of evidence").

Employer must produce facts, not speculation, to overcome the presumption of compensability. Reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption created by Section 20(a). See Smith v. Sealand Terminal, 14 BRBS 844 (1982). The testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. See Kier v. Bethlehem Steel Corp., 16 BRBS 128 (1984).

When aggravation of or contribution to a pre-existing condition is alleged, the presumption still applies, and in order to rebut it, Employer must establish that Claimant's work events neither directly caused the injury nor aggravated the pre-existing condition resulting in injury or pain. Rajotte v. General Dynamics Corp., 18 BRBS 85 (1986). A statutory employer is liable for consequences of a work-related injury which aggravates a pre-existing condition. See Bludworth Shipyard, Inc. v. Lira, 700 F.2d 1046 (5th Cir. 1983); Fulks v. Avondale Shipyards, Inc., 637 F.2d 1008, 1012 (5th Cir. 1981). Although a pre-existing condition does not constitute an injury, aggravation of a pre-existing condition does. Volpe v. Northeast Marine Terminals, 671 F.2d 697, 701 (2d Cir. 1982). It has been repeatedly stated employers accept their employees with the frailties which predispose them to bodily hurt. J. B. Vozzolo, Inc. v. Britton, supra at 147-148.

If an administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole. Universal Maritime Corp. v. Moore, 126 F.3d 256, 31 BRBS 119(CRT)(4th Cir. 1997); Hughes v. Bethlehem Steel Corp., 17 BRBS 153 (1985); Director, OWCP v. Greenwich Collieries, supra.

In this case, causation concerning the compensable injury of April 14, 2004 is uncontroverted. However, Employer contends the compensable injury resolved and Claimant was released by her physicians to return to full duty work in July 2004, thereby ending Employer's responsibility for the compensable injury. Employer further contends that Claimant's complaints after her release in July 2004 either lack credibility or are not causally related to the compensable injury.

In support of this position, Employer presents evidence that three of Claimant's treating physicians have released her to return to full duty work without restrictions. Dr. Johnson who initially treated Claimant for the compensable injury of April 14, 2004, released her to full duty capacity on July 1, 2004. Likewise, Dr. Treuting, who treated Claimant's ankle, and Dr. Meyer who treated Claimant's knee, have both released Claimant to full duty work capacity.

Additionally, Employer questions the veracity of Claimant's complaints of pain. In support, Employer points to testimony by Dr. Johnson that he found no evidence of "massive swelling" when she presented to him on July 15, 2004, which Claimant stated occurred upon her return to work. Dr. Treuting opined that Claimant's exhibition of hypersensitivity to palpation during examination of her ankle was out of proportion to his objective findings. Also, MRIs performed at the direction of Drs. Johnson and Treuting failed to reveal problems which they felt justified Claimant's complaints. Dr. Katz opined the timing of Claimant's complaints and treatment lead logically to a conclusion that her present symptoms are not causally related to the compensable accident in April 2004.

Employer further contends that Claimant's subsequent fall is not causally related to the compensable injury. In support, Employer relies on the testimony of Dr. Meyer who stated that he would not relate any of the pathologies he detected in Claimant's left knee to the circumstances of Claimant's fall.

The testimony of Drs. Johnson, Treuting, and Meyer, three of Claimant's treating physicians and the medical evaluation performed by Dr. Katz constitutes substantial evidence in support of Employer's position. Accordingly, I find that Employer has successfully rebutted the Section 20(a) presumption that Claimant's heel injury in June 2005, and back and leg pain subsequent to her release to full duty in July 2004, were causally related to her compensable injury on April 14, 2004. Therefore, the record evidence as a whole must be weighed and evaluated to determine whether Claimant's complaints and injury subsequent to July 2004 were causally related to the compensable injury.

3. Weighing All the Evidence

The compensable injury on April 14, 2004, is uncontroverted in this case. However, Employer contends that subsequent

complaints of knee and ankle pain by Claimant are not credible and in the alternative, not causally related to the compensable injury. Employer also contends that subsequent back pain and Claimant's fall on June 8, 2005, are not causally related to the compensable injury.

The medical evidence presented consists mainly of opinions and records of six physicians. Four are treating physicians of Claimant's choosing, one is a physician whom she consulted, and one who performed an exam at the behest of Employer.

Claimant was treated initially by Dr. Johnson for the compensable injuries received on April 14, 2004. Dr. Johnson later referred Claimant to Dr. Treuting who treated her ankle and referred her to Dr. Meyer for her knee. Dr. Meyer later referred Claimant to Dr. Eissa for further treatment of her knee. In August 2004, prior to treatment by Dr. Treuting, Claimant consulted Dr. Robert Sellards of the LSU Department of Orthopedic Surgery, Sports Medicine Section. Claimant presented to Dr. Katz on February 22, 2006 for an Employer medical evaluation.

Drs. Johnson, Treuting, and Meyer have released Claimant to full duty work, while Dr. Eissa has released Claimant to light duty. Dr. Sellards has not rendered a current opinion regarding Claimant's work status. However, it should be noted that the full duty work release is not dispositive of the issue of whether or not Claimant's compensable injury fully resolved or the nature and extent of any persisting disability.

Claimant's complaints of knee/ankle pain, back pain, and her fall on June 8, 2005, are addressed below.

Claimant's Continued Complaints of left knee/ankle pain

Claimant's **credible** subjective complaints of symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case and the invocation of the Section 20(a) presumption. See Sylvester v. Bethlehem Steel Corp., 14 BRBS 234, 236 (1981), aff'd sub nom. Sylvester v. Director, OWCP, 681 F.2d 359, 14 BRBS 984 (CRT)(5th Cir. 1982).

I find Claimant's testimony to be credible. She testified that she is unable to return to her former employment. Further credible testimony of Claimant's sons verified her limited ability to perform tasks such as grass cutting that Claimant performed prior to her injury. Included in Dr. Eissa's medical

notes is a notation of Claimant's depression over her inability to perform former tasks such as grass cutting.

Dr. Johnson, who treated Claimant initially for the compensable injury, opined the aggravation that occurred to Claimant's chondromalacia had resolved, and released her to full duty work. He also testified that he had no reason to doubt the truthfulness of Claimant's subjective complaints.

Dr. Treuting treated only Claimant's ankle. He released Claimant to full duty work, and opined that the compensable injury was not the cause of her current pain. He thought her sensitivity to examination was out of proportion to his objective findings, but stopped short of opining that Claimant was not actually in pain. Additionally, Dr. Treuting suggested Claimant consult Dr. Eissa concerning her back pain and prescribed a cane, indicating he placed credence in her back complaints.

Dr. Meyer treated Claimant's knee and released her to full duty work. Since his deposition, he has continued to treat Claimant and ordered another MRI of her knee. He testified that he is not surprised by Claimant's continued complaints of pain and opined that a fall such as her's on April 14, 2004 could cause cartilage damage that cannot be seen by normal x-rays or MRI. This testimony does not dispute Claimant's testimony that she continues to experience knee and ankle pain.

Based on the testimony outlined above, I conclude that in the instant case, Claimant's complaints of persistent knee and ankle pain are questioned, but not rebutted or controverted by medical testimony.

Perhaps most significant is the objective medical evidence documenting the onset and progression of arthritis in Claimant's left knee.

On June 21, 2004, Claimant presented to Dr. Johnson who ordered an MRI of Claimant's ankle and foot. He reviewed this MRI with Claimant on July 1, 2004, and testified that it revealed only chondromalacia in Claimant's knee. The MRI did not show arthritis. However, he also opined that the original patella contusion could trigger the development of arthritis. This same MRI was read by Dr. Sellards who noted "some patellar chondromalacia," but no arthritis.

On April 25, 2005, Dr. Meyer reviewed radiographs of Claimant's knee. He stated they indicated mild arthritic changes in the knee, and that arthritis in a woman of Claimant's age was uncommon, but not unusual. In his notes of Claimant's office visit on June 20, 2005, Dr. Meyer noted his impression of "mild osteoarthritis of the knee."

Claimant presented to Dr. Katz for an Employer medical evaluation on February 22, 2006. At that time x-rays of Claimant's left knee and ankle were taken, which revealed arthritis in Claimant's knee. Both Drs. Katz and Johnson opined that trauma can trigger the onset of arthritis. Dr. Katz stated he reviewed the depositions of Drs. Treuting and Meyer, but not Dr. Johnson. Dr. Katz went on to opine that Claimant's arthritis pre-dated her injury, which is not supported by the objective medical evidence.

The medical evidence suggests that arthritis in Claimant's knee was not present immediately after the compensable injury, but appeared by April 25, 2005, approximately one year after the April 2004 injury, and progressed thereafter. The only suggested event that may constitute an intervening or supervening event was Claimant's fall on June 8, 2005, after the documented onset of arthritis in Claimant's knee.

Therefore, not only are Claimant's complaints of persistent knee and ankle pain not controverted by the medical opinions presented, her claims are also supported by the objective medical evidence of onset and progression of arthritis. The medical opinions and timing of medical tests support the conclusion that the onset and progression of Claimant's arthritis was causally related to her compensable injury on April 14, 2004.

Consequently, based on all of the evidence presented, I find that Claimant's complaints of persistent knee and ankle pain are credible and are causally related to Claimant's compensable injury.

Claimant's fall on June 8, 2005 causing heel injury

If there has been a **subsequent non-work-related injury or aggravation**, the Employer is liable for the entire disability **if** the second injury or aggravation is the natural or unavoidable result of the first injury. Atlantic Marine v. Bruce, supra; Cyr v. Crescent Wharf & Warehouse Co., 211 F.2d 454 (9th Cir. 1954)(if an employee who is suffering from a compensable injury

sustains an additional injury as a natural result of the primary injury, the two may be said to fuse into one compensable injury); Mijangos v. Avondale Shipyards, 19 BRBS 15 (1986).

If, however, the subsequent injury or aggravation is not a natural or unavoidable result of the work injury, but is the result of an intervening cause such as the employee's intentional or negligent conduct, the employer is relieved of liability attributable to the subsequent injury. Bludworth Shipyard v. Lira, 700 F.2d 1046, 15 BRBS 120 (CRT)(5th Cir. 1983); Colburn v. General Dynamics Corp., 21 BRBS 219, 222 (1988).

Claimant credibly testified that her knee "gave out" causing her to fall and suffer a laceration to her heel on June 8, 2005. She presented to Kenner Regional Medical Center with an "8 cm laceration to heel of left foot." She received stitches and the laceration apparently resolved.

Although later Claimant reported a burning pain in the heel to Dr. Treuting, she does not contend, nor does the medical evidence support a contention that the heel laceration in any way contributed to or aggravated Claimant's present knee, ankle, or back conditions. Accordingly, I find that this event does not constitute a supervening event for purposes of severing Employer's liability.

Dr. Meyer, who treated Claimant's knee, testified that he would not attribute a "giving out" of Claimant's knee to any of the pathologies he detected. He opined that weakness of the quadriceps due to restricted use can cause feelings of instability, but he had not found such weakness. Claimant testified of several activities that she performed prior to the compensable injury which she no longer performed. This inactivity could have lead to weakness of the quadriceps as Dr. Meyer opined.

Dr. Katz, in his report dated February 22, 2006, stated that Claimant may benefit from continued quadriceps strengthening as recommended by Dr. Meyer.

Claimant was undergoing physical therapy at the time of the fall. The physical therapist noted on June 3, 2005, "decreased balance in SLS [single leg stance] evident upon observation today." This instability, observed only five days prior to Claimant's fall, likely contributed, at least in part, to Claimant's heel injury.

While the medical evidence does not definitively establish a causal relationship between Claimant's compensable injury in April 2004 and her fall on June 8, 2005, it outlines the existence of conditions which logically infer that the compensable injury contributed to Claimant's fall.

Based on the foregoing, I find that Claimant's fall on June 8, 2005, was a natural and unavoidable consequence of her compensable injury on April 14, 2004. Accordingly, I find that this event does not constitute a supervening or intervening event for purposes of severing Employer's liability.

Claimant's Complaint of Back Pain

The medical record contains multiple instances of documentation that Claimant walks with an antalgaic gait. On March 17, 2005, Dr. Treuting noted Claimant's gait. It was also observed by her physical therapist on May 5, 2005, by Dr. Eissa on January 17, 2006, and by Dr. Katz on February 22, 2006. Documentation of Claimant's gait preceded her fall in June 2005. There is nothing in the record to suggest that Claimant's gait was the result of any event other than the compensable injury in April 2004.

The first documentation of Claimant's complaints of back pain was on January 6, 2006, to Dr. Treuting. He suggested Claimant address it with Dr. Eissa, who treats such ailments, and provided a prescription for a cane. Dr. Eissa stated in his assessment on January 17, 2006, that Claimant's back pain was probably secondary to her antalgic gait. No evidence has been introduced to controvert Dr. Eissa's assessment.

As observed by Employer, the length of time between the compensable injury in April 2004, and Claimant's first documented complaint of back pain in January 2006, suggests that no causal relationship exists between the two events. However, all factors must be weighed in the determination of causation, not only timing.

In light of the medical evidence, particularly the opinion of Dr. Eissa, I find and conclude that Claimant's back pain is a natural and unavoidable consequence of the work-related injury sustained on April 14, 2004.

Based on an evaluation of the record as a whole, I find and conclude that persisting knee, ankle, and back pain experienced

by Claimant, and her fall on June 8, 2005, are causally related to the compensable injury on April 14, 2004.

B. Nature and Extent of Disability

Having found that Claimant suffers from a compensable injury, however the burden of proving the nature and extent of her disability rests with the Claimant. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1980).

Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept.

Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, except in the case of a scheduled disability, for Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. Watson v. Gulf Stevedore Corp., 400 F.2d 649, pet. for reh'g denied sub nom. Young & Co. v. Shea, 404 F.2d 1059 (5th Cir. 1968)(per curiam), cert. denied, 394 U.S. 876 (1969); SGS Control Services v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. Trask, supra, at 60. Any disability suffered by Claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metropolitan Area Transit Authority, 16 BRBS 231 (1984); SGS Control Services v. Director, OWCP, supra, at 443.

The question of extent of disability is an economic as well as a medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir 1968); Eastern S.S. Lines v. Monahan, 110 F.2d 840 (1st Cir. 1940); Rinaldi v. General Dynamics Corporation, 25 BRBS 128, 131

(1991).

To establish a **prima facie** case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. Elliott v. C & P Telephone Co., 16 BRBS 89 (1984); Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988); Louisiana Insurance Guaranty Association v. Abbott, 40 F.3d 122, 125 (5th Cir. 1994).

Claimant's present medical restrictions must be compared with the specific requirements of his usual or former employment to determine whether the claim is for temporary total or permanent total disability. Curit v. Bath Iron Works Corp., 22 BRBS 100 (1988). Once Claimant is capable of performing his usual employment, he suffers no loss of wage earning capacity and is no longer disabled under the Act.

C. Maximum Medical Improvement (MMI)

The traditional method for determining whether an injury is permanent or temporary is the date of maximum medical improvement. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235, n. 5 (1985); Trask v. Lockheed Shipbuilding Construction Co., supra; Stevens v. Lockheed Shipbuilding Company, 22 BRBS 155, 157 (1989). The date of maximum medical improvement is a question of fact based upon the medical evidence of record. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979).

An employee reaches maximum medical improvement when his condition becomes stabilized. Cherry v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 857 (1978); Thompson v. Quinton Enterprises, Limited, 14 BRBS 395, 401 (1981).

In the present matter, nature and extent of disability and maximum medical improvement will be treated concurrently for purposes of explication.

Claimant contends in brief that she has not reached MMI because Drs. Meyer and Eissa have not released her, no doctor has assigned an impairment rating for any part of her body, and further treatment is anticipated because of her impairment.

In the instant case, medical opinions regarding whether Claimant has reached maximum medical improvement were rendered by Drs. Johnson, Treuting, and Meyer. Dr. Johnson assigned July

15, 2004, as the date of MMI for Claimant's knee and ankle "at least with regard to his treatment." Dr. Treuting assigned a date of MMI of her ankle of April 14, 2005. Dr. Meyer assigned a date of MMI of Claimant's knee of August 1, 2005.

The record does not contain an opinion from Dr. Eissa, the other treating physician, regarding MMI. However, Dr. Eissa noted on January 17, 2006, that Claimant need not continue follow-up except for refill of prescriptions. Dr. Eissa's assessment on that date included "lower back pain secondary to antalgic gait," but provided no further plan for treatment.

Claimant correctly relies on Kuhn v. Associated Press, 16 BRBS 46 (1983), for the proposition that where further surgery is anticipated, a finding of maximum medical improvement is precluded. However, in this case, unlike Kuhn, the medical evidence does not support a contention that surgery is anticipated. Dr. Eissa noted on a June 3, 2005 prescription for a knee stimulator that Claimant was a potential candidate for total knee replacement. However, there is nothing further in the medical record to indicate that Dr. Eissa actually recommended such surgery or anticipated it in Claimant's case.

Claimant also contends that Drs. Meyer and Eissa anticipate additional treatment intended to improve Claimant's condition. Since a physician has determined that further treatment should be undertaken, presumably with a possibility of success, it is contended that MMI will not be reached until the conclusion of such treatment. Claimant correctly cites Louisiana Ins. Guaranty Ass'n v. Abbott, 40 F.3d 122, 29 BRBS 22 (CRT)(5th Cir. 1994), aff'g 27 BRBS 192 (1993), for this proposition.

In January 2006, Dr. Eissa noted that he has no planned follow-up other than continuation of the prescribed Lidoderm patches and knee stimulator, which he apparently first prescribed on June 1, 2005. He does not state nor indicate that continuation of these prescriptions is intended to improve Claimant's condition beyond the point already reached.

In his deposition, Dr. Meyer assigned a date of MMI. Thereafter, he ordered an MRI and opined that additional measures would be warranted if certain conditions were found. Concerning Claimant's knee, he also testified that additional Synvisc injections and/or continued quadriceps strengthening may be helpful. Dr. Katz agreed with this plan noting it as treatment of Claimant's symptoms.

While some improvement to Claimant's condition may be anticipated by treatments referred to by Drs. Meyer and Eissa, neither doctor indicates that Claimant's recovery is expected. None of the treating physicians have expressed opinions or implied that recovery is expected, or that Claimant's maladies are not of an indefinite duration. Therefore, Claimant has not established that medical treatment is pending such as that anticipated in Louisiana Ins. Guaranty Ass'n v. Abbott, supra.

Based on the foregoing, I find and conclude that Claimant reached maximum medical improvement with regard to her ankle and knee on August 1, 2005, and with regard to her back on January 17, 2006. Therefore, the nature of Claimant's disability, to the extent one existed, was temporary from April 14, 2004 through July 31, 2005, and permanent from August 1, 2005.

Claimant's former employment as an electronic technician is considered medium duty work according to Mr. Nebe, a licensed vocational consultant with FARA. Employer contends Claimant is capable of unrestricted work, and is therefore has no disability.

None of Claimant's doctors have assigned an impairment rating with regard to any of her body members. Dr. Johnson, who initially treated Claimant's knee and ankle, released Claimant to return to full duty work on approximately July 1, 2004, prior to his referral of Claimant to Dr. Treuting. Dr. Treuting, who treated only Claimant's ankle, released Claimant to unrestricted work, with regard to her ankle, on April 14, 2005. Dr. Treuting referred Claimant to Dr. Eissa for further treatment regarding her ankle and back pain.

Dr. Meyer treated Claimant's left knee. On April 27, 2005, upon Claimant's initial visit, he imposed work restrictions of "light duty work with restrictions on climbing, kneeling, and squatting." He released her to full duty work on July 6, 2005, after her third Synvisc injection, noting that Claimant had experienced significant improvement from the first two injections. Dr. Meyer stated at deposition on January 25, 2006, that he was not surprised at Claimant's continued problems due to potential undetected damage to her knee. He further stated if additional treatment were warranted, he would recommend repeating the Synvisc injections. Claimant also testified she improved from the injections, but stated she later regressed, experiencing pain to a lesser degree than prior to the injections. Claimant presented again to Dr. Meyer on February

22, 2006, after his deposition, when he ordered an MRI of Claimant's left knee which has not yet been accomplished.

Dr. Meyer's testimony, and continued treatment of Claimant, indicate that although Dr. Meyer issued an unretracted release of Claimant to full duty work, his release was not without reservation. Therefore, I find and conclude that the medical evidence regarding Dr. Meyer, taken as a whole, is consistent with a finding that Claimant is properly restricted to light duty work.

Claimant was referred to Dr. Eissa by Dr. Treuting. Dr. Eissa treated Claimant's ankle and knee, and diagnosed her back pain as secondary to her antalgic gait on January 17, 2006. He released her to light duty work on May 30, 2005, and his recommendation has remained unchanged.

Dr. Katz, who examined Claimant only once at the request of Employer, recommended light duty and a functional capacity evaluation to determine if Claimant could perform medium duty work. The record does not contain an opinion concerning work restrictions by Dr. Sellards, with whom Claimant consulted in August 2004.

Based on the ongoing work restriction to "light duty" by Dr. Eissa, I find that Claimant is unable to return to her usual employment as an electronic technician. Therefore, she is considered totally disabled unless suitable alternative employment is demonstrated.

The Scheduled Disability Benefits

If a permanent disability occurs to a body member identified in Section 908(c)(1) through (20), the injured employee is entitled to receive two-thirds of her average weekly wage for a specified number of weeks, regardless of whether her earning capacity has been impaired. See Henry v. George Hyman Construction Co., 749 F.2d 65, 17 BRBS 39 (CRT) (D. C. Cir. 1984).

In the case of permanent partial disability, Section 8(c)(2) of the Act provides an employee with "leg lost" compensation for 288 weeks at a rate of sixty-six and two-thirds percent of her average weekly wage. Section 8(c)(19) of the Act further states that "compensation for permanent partial loss of use of a member may be for proportionate loss or loss of use of the member." Compensation is limited exclusively to the

statutory scheme. See Potomac Electric Power Company v. Director, OWCP, 449 U.S. 268, 101 S. Ct. 509 (1980) (hereinafter "PEPCO").

A scheduled injury can give rise to permanent total disability pursuant to Section 908(a), in which case the statutory scheme of Section 908(c)(1) through (20) becomes irrelevant. PEPCO, supra at n. 17. Further, the Supreme Court limited its holding in PEPCO to circumstances where the scheduled injury was confined in effect to the injured part of the body. PEPCO, supra at n. 20.

In the instant case, the parties stipulated that Claimant experienced a compensable injury on April 14, 2004, to her knee and ankle. These are scheduled injuries under Section 8(c)(2) of the Act. Therefore, if Claimant is found to have permanent partial disability as a result of her scheduled injury, her compensation is governed by Section 908(c)(2) of the Act, exclusively.

The Board has held that in the case of two distinct injuries, a scheduled injury and non-scheduled injury arising either from a single accident or multiple accidents, she may be entitled to receive compensation under both the schedule and Section 8(c)(21). Since the scheduled injury is being compensated separately, any loss in wage-earning capacity due to the scheduled injury must be factored out of the Section 8(c)(21) award. Frye v. Potomac Electric Power Company, 21 BRBS 194 (1988). The Board has also recognized this reasoning in the circumstance where Claimant developed a lower back condition as a consequence of a compensable injury to her ankle. Thompson v. Lockheed Shipbuilding and Construction Co., 21 BRBS 94 (1988).

Claimant's complaints of back pain are found to be causally related to the compensable injury. Since the back is not a part of the body scheduled in Section 908(c)(1) through (20), if claimant's wage-earning capacity was decreased by her back malady to a greater extent than it was decreased by the scheduled injuries, then Claimant may be entitled to compensation under Section 908(c)(21).

However, in this case, there is no testimony or other evidence to suggest that Claimant's back pain in any way increased her level of physical or economic disability over that resulting from the scheduled injuries. Therefore, application of Section 908(c)(21) is not justified with respect to Claimant's back maladies separate from her scheduled injuries.

Accordingly, I find that Claimant, having established a **prima facie** case of total disability, will be restricted to proportionate compensation under Section 908(c)(2) of the Act if the disability is found to be partial. If, however, the disability is found to be total, Claimant's compensation is properly governed by Section 908(c)(21) of the Act. The question of extent of disability is determined by demonstration of suitable alternative employment or lack thereof.

D. Suitable Alternative Employment

If the claimant is successful in establishing a **prima facie** case of total disability, the burden of proof is shifted to employer to establish suitable alternative employment. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038 (5th Cir. 1981). Addressing the issue of job availability, the Fifth Circuit has developed a two-part test by which an employer can meet its burden:

> (1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do?
>
> (2) Within the category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he reasonably and likely could secure?

Id. at 1042. Turner does not require that employers find specific jobs for a claimant; instead, the employer may simply demonstrate "the availability of general job openings in certain fields in the surrounding community." P & M Crane Co. v. Hayes, 930 F.2d 424, 431 (1991); Avondale Shipyards, Inc. v. Guidry, 967 F.2d 1039 (5th Cir. 1992).

However, the employer must establish **the precise nature and terms** of job opportunities it contends constitute suitable alternative employment in order for the administrative law judge to rationally determine if the claimant is physically and mentally capable of performing the work and that it is realistically available. Piunti v. ITO Corporation of Baltimore, 23 BRBS 367, 370 (1990); Thompson v. Lockheed Shipbuilding & Construction Company, 21 BRBS 94, 97 (1988). The

administrative law judge must compare the jobs' requirements identified by the vocational expert with the claimant's physical and mental restrictions based on the medical opinions of record. Villasenor v. Marine Maintenance Industries, Inc., 17 BRBS 99 (1985); See generally Bryant v. Carolina Shipping Co., Inc., 25 BRBS 294 (1992); Fox v. West State, Inc., 31 BRBS 118 (1997). Should the requirements of the jobs be absent, the administrative law judge will be unable to determine if claimant is physically capable of performing the identified jobs. See generally P & M Crane Co., supra at 431; Villasenor, supra.

The Administrative Law Judge as fact-finder may rely on his observations of the Claimant in concluding that Claimant no longer possessed a necessary skill to perform a specific job. Caudill v. Sea Tac Alaska Shipbuilding, 25 BRBS 92 (1991), aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP, 8 F.3d 29 (9th Cir. 1993). In Caudill, supra, the Board affirmed a finding that although Claimant was physically able to perform the job of automobile salesman, he no longer possessed the requisite skills to perform such work.

The Benefits Review Board has announced that a showing of available suitable alternate employment may not be applied retroactively to the date the injured employee reached MMI and that an injured employee's total disability becomes partial on the earliest date that the employer shows suitable alternate employment to be available. Rinaldi v. General Dynamics Corporation, 25 BRBS at 131 (1991).

Employer contends that it has demonstrated suitable alternative employment as outlined in a vocational report dated March 9, 2006, by Michael Nebe, a vocational expert. The report identified seven jobs which Mr. Nebe testified are suitable for Claimant. Additionally, Mr. Nebe identified two jobs at formal hearing. Each is addressed below.

Mr. Nebe was denied access to Claimant for purposes of determining suitable alternative employment. The Board has held that a claimant "must, if possible considering her medical condition, reasonably cooperate with employer's rehabilitation specialist." The Board considered it an improper legal standard to discredit the findings of a rehabilitation specialist without considering a claimant's lack of cooperation. Villasenor v. Marine Maintenance Industries, Inc., 17 BRBS 99 (1985).

Mr. Nebe testified that if all relevant information was included in the reports he received, his report would be

unaffected by his inability to personally meet with Claimant. Therefore, Claimant's lack of cooperation will be addressed on the basis of whether or not Mr. Nebe had ready access to the same relevant information that he may reasonably have obtained from Claimant had he been allowed to meet with her. Stated another way, if Mr. Nebe had actual knowledge of, or access to evidence used herein to discredit any portion of his opinion or conclusions, the fact of Claimant's lack of cooperation will not be considered to have prejudiced Mr. Nebe's preparation of an appropriate vocational report.

Work Restrictions

The vocational report states work restrictions as "light duty with no climbing, per Dr. Eissa to no restrictions and full duty work releases from Drs. Johnson, Treuting and Meyer."

Mr. Nebe testified that because the medical reports did not specify limits on standing, walking, lifting, kneeling, or alternating of positions, no such limitation of Claimant's physical ability was considered. He was aware that a cane had been prescribed for Claimant, but deferred to the specific restrictions imposed by her doctors. Specifically, Mr. Nebe noted Dr. Treuting's deposition reflects that Claimant's prescription for a cane would not have changed his (Dr. Treuting's) release for Claimant to return to work without restrictions.

Dr. Treuting testified he treated only Claimant's ankle, and opined only concerning her ankle. Therefore, Mr. Nebe's reliance on Dr. Treuting's testimony as a basis for failing to consider Claimant's use of a cane is misplaced, as Dr. Treuting did not render an opinion regarding Claimant's knee or back.

The light duty work restrictions imposed by Dr. Eissa on May 30, 2005, stated only the criteria listed on the pre-printed form without specific restrictions on activity involving movement of the ankle, knee, or leg. On April 25, 2005, Dr. Meyer assigned light duty work enumerating restrictions on climbing, kneeling, and squatting. Dr. Meyer released Claimant to unrestricted work, whereas Dr. Eissa has not. Dr. Eissa also noted Claimant's lower back pain was secondary to her antalgic gait.

Both Drs. Meyer and Eissa treated Claimant's knee. The restrictions imposed by the two doctors, five days apart, were based upon the same maladies. In view of the close proximity in

time of the light duty restrictions that were assigned by both doctors for the same knee condition, I find it is reasonable to conclude the restrictions imposed by Dr. Eissa lacked specificity regarding climbing, kneeling, and squatting only by way of oversight. Accordingly, I find and conclude that the work restrictions imposed by Dr. Eissa arguably include the same specific restrictions as were assigned by Dr. Meyer on April 25, 2005.

Mr. Nebe's report states he reviewed the depositions of Drs. Meyer and Treuting. Additionally, it refers to work restrictions imposed by Dr. Eissa. Although the exact records reviewed by Mr. Nebe are not listed, he apparently had access to the records of Dr. Eissa. Thus, Mr. Nebe had actual knowledge of the information stated above. He also stated he had knowledge that Claimant was prescribed a cane. Therefore, Mr. Nebe's lack of access to a personal interview of Claimant did not impair his ability to respond to the evidence cited above.

I find and conclude that the proper work restrictions as imposed by Claimant's physicians, and based on the fact that she ambulates with a cane, are light duty work with specific restrictions on **climbing, kneeling, and squatting.** I further find that the fact that Mr. Nebe was not allowed to personally interview Claimant did not impact his vocational report or opinion.

Available Jobs

The vocational report identified seven jobs as suitable alternative employment in the Claimant's relevant community and Mr. Nebe identified two additional jobs at formal hearing. Mr. Nebe testified that all jobs listed are considered light to sedentary work. Claimant testified that she applied for the jobs listed in the vocational report.

Under the standards established in Turner, the requirements of each job must be examined both in terms of the abilities of Claimant and availability in the community. Each is addressed below in turn.

At formal hearing, Mr. Nebe identified the position of **security guard/officer** at the Audubon Zoo. Duties include record keeping, monitoring, patrolling the grounds on foot and in a vehicle, and crowd control activity. As the job description did not specifically identify the physical requirements of the job, a comparison of the requirements to

Claimant's physical capabilities cannot be completed. Therefore, I find that the position of security guard/officer at Audubon Zoo does not constitute suitable alternative employment in this case.

One characteristic of suitable alternative employment under Turner, supra, is that Claimant "reasonably and likely could secure" the position. Prefatorily, it should be noted that although walking restrictions are not included specifically in Claimant's work restrictions, her use of a cane to ambulate must be taken into account when assessing Claimant's realistic chances of securing the position.

It is highly questionable whether Claimant, who ambulates with a cane, can reasonably and likely secure a position requiring foot patrolling of a multi-acre facility and crowd control. Accordingly, I further find that the position of security guard/officer at Audubon Zoo does not constitute a job that Claimant could reasonably and likely secure, and therefore does not constitute suitable alternative employment.

The other positions identified at formal hearing were **security positions** with Inner Parish Security. The physical requirements of the job as to patrolling or stair climbing were not articulated. As the record contains insufficient information to determine if the physical requirements of the positions are within Claimant's work restrictions, I find that these positions do not constitute suitable alternative employment for Claimant.

The following positions were identified in the vocational report. Five positions were available in March 2006, when the report was prepared. The other two positions were available in August 2005.

The position of **loss prevention camera operator** for Dillard's department store requires operating a surveillance camera to monitor various store departments. This job appears to be sedentary, although if duties include stair climbing, this may exceed Claimant's physical capabilities. If duties do not exceed Claimant's physical capabilities, this job would constitute suitable alternative employment. Since specific physical requirements are not included in the record, I find that this position does not constitute suitable alternative employment. This position was already filled when Claimant attempted to apply.

The position of **optician trainee** with National Optical Warehouse includes duties of fitting, dispensing, and fabricating eyewear. The potential employer preferred customer service experience. Although duties listed would seem to involve tasks that are within Claimant's physical capabilities, the specific physical requirements of the job are not listed. Therefore, a comparison of Claimant's capabilities with the physical requirements of the position cannot be accomplished. Accordingly, I find this position does not constitute appropriate employment for Claimant.

A position as **cashier/clerk** at LaPlace Travel Center was also listed. Duties include receipt of payments in a convenience store/truck stop. As the record lacks the physical requirements of the positions I am unable to determine if the physical requirements are within Claimant's work restrictions. Accordingly, I find that this position does not constitute suitable alternative employment for Claimant.

Claimant credibly testified that she failed at similar employment at a Shell station in January 2005, because the physical demands of stocking were beyond her capabilities. Specifically, stocking of ice bins required climbing, and stocking of shelves required stooping which were beyond Claimant's physical capabilities.

The position of **security guard** (armed and unarmed), with L&R Security Service was identified. Duties included patrolling and monitoring premise, completion of reports, and contacting authorities if needed. As stated above, patrolling of premises may constitute a requirement that would render employment outside of the scope which Claimant may reasonably and likely secure. If the scope of patrolling includes stair climbing, the physical requirements of the job would be beyond Claimant's work restrictions. Because the scope of patrolling activities is not included in the record, I find that the position of security guard does not constitute suitable alternative employment.

Duties of **surveillance operator trainee** for Boomtown Casino include monitoring using electronic and video equipment, recording information and completion of daily reports. Physical requirements of this position are not included in the record. Since specific physical requirements are not included in the record, I find that this position does not constitute suitable alternative employment.

The position of **cashier** at the Aquarium of the Americas was available in August 2005. Duties included accepting payments and issuing tickets. Physical requirements of this position are within Claimant's restrictions. I find this position **constitutes** appropriate employment for Claimant.

The position of **parking booth attendant** at New South Parking System was available in August 2005. Duties included accepting payments from parking customers. Physical requirements of this position are within Claimant's restrictions. I find this position **constitutes** appropriate employment for Claimant.

Finally, Mr. Nebe identified jobs available at Employer's facility in Claimant's former position. As stated earlier, Claimant's former job is considered medium duty work and is outside of Claimant's work restrictions.

In summary, the vocational report dated March 9, 2006, identified two positions available in August 2005, which are determined to be suitable employment for Claimant. No positions available at the time of preparation of the report were found to constitute suitable alternative employment. Since all relevant medical information used in this analysis was available to Mr. Nebe at the time of preparation of his report, I find his lack of access to a personal interview of Claimant did not affect his report. I further find that Employer has met its burden of establishing suitable alternative employment.

Once the employer demonstrates the existence of suitable alternative employment, as defined by the Turner criteria, the claimant can nonetheless establish total disability by demonstrating that she tried with reasonable diligence to secure such employment and was unsuccessful. Turner, supra at 1042-1043; P & M Crane Co., supra at 430. Thus, a claimant may be found totally disabled under the Act "when physically capable of performing certain work but otherwise unable to secure that particular kind of work." Turner, supra at 1038, quoting Diamond M. Drilling Co. v. Marshall, 577 F.2d 1003 (5th Cir. 1978).

Having found that Employer established suitable alternative employment by virtue of the report prepared by Mr. Nebe, the efforts of Claimant to secure employment must be examined to determine whether she has demonstrated an inability to secure such employment after diligent effort.

Claimant applied for all positions listed in the vocational report as currently available within approximately one week after the report date. However, despite personal follow-up with some employers, she had not received a job offer or other communication from any of the potential employers.

In December 2004 and January 2005, Claimant attempted a return to employment in entry level positions. In December 2004, she maintained seasonal sales employment at Macy's while in pain. She believed her job performance was inadequate. Her belief was supported by Macy's lack of a permanent job offer to Claimant although other seasonal employees were offered permanent positions. In January 2005, she resigned from a cashier position at Shell because of her physical limitations. Finally, Claimant on her own initiative applied for a position in electronics with a placement agency after they responded to a resume she had posted on monster.com. Upon applying in person, Claimant was told that she could not be considered presently because of her gait.

Thus, Claimant has applied and failed to secure employment both in her former field and entry level jobs similar to those listed in the vocational report and deemed to be suitable employment. I find that the efforts of Claimant to secure employment constitute reasonably diligent effort, yet she has lacked success. Accordingly, I find that Claimant has established total disability by virtue of her diligent effort and failure to secure employment similar to and identified by the vocational expert.

Therefore, Claimant has established temporary total disability from April 14, 2004 through July 31, 2005, and permanent total disability from August 1, 2005, and continuing. Additionally, having established total disability, I find that Claimant's compensation is properly governed by Section 908(c)(21) of the Act, and is not limited by Section 908(c)(2).

E. Average Weekly Wage

Section 10 of the Act sets forth three alternative methods for calculating a claimant's average annual earnings, 33 U.S.C. § 910 (a)-(c), which are then divided by 52, pursuant to Section 10(d), to arrive at an average weekly wage. The computation methods are directed towards establishing a claimant's earning power at the time of injury. SGS Control Services v. Director, OWCP, supra, at 441; Johnson v. Newport News Shipbuilding & Dry Dock Co., 25 BRBS 340 (1992); Lobus v. I.T.O. Corp., 24 BRBS 137

(1990); Barber v. Tri-State Terminals, Inc., 3 BRBS 244 (1976), aff'd sum nom. Tri-State Terminals, Inc. v. Jesse, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979).

Section 10(a) provides that when the employee has worked in the same employment for substantially the whole of the year immediately preceding the injury, his annual earnings are computed using his actual daily wage. 33 U.S.C. § 910(a). Section 10(b) provides that if the employee has not worked substantially the whole of the preceding year, his average annual earnings are based on the average daily wage of any employee in the same class who has worked substantially the whole of the year. 33 U.S.C. § 910(b). But, if neither of these two methods "can reasonably and fairly be applied" to determine an employee's average annual earnings, then resort to Section 10(c) is appropriate. Empire United Stevedore v. Gatlin, 935 F.2d 819, 821, 25 BRBS 26 (CRT) (5th Cir. 1991).

Subsections 10(a) and 10(b) both require a determination of an average daily wage to be multiplied by 300 days for a 6-day worker and by 260 days for a 5-day worker in order to determine average annual earnings.

Section 10(c) of the Act provides:

> If either [subsection 10(a) or 10(b)] cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee and the employment in which he was working at the time of his injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

33 U.S.C § 910(c).

The Administrative Law Judge has broad discretion in determining annual earning capacity under subsection 10(c). Hayes v. P & M Crane Co., supra; Hicks v. Pacific Marine & Supply Co., Ltd., 14 BRBS 549 (1981). It should also be stressed that the objective of subsection 10(c) is to reach a fair and reasonable approximation of a claimant's wage-earning capacity at the time of injury. Barber v. Tri-State Terminals,

Inc., supra. Section 10(c) is used where a claimant's employment, as here, is seasonal, part-time, intermittent or discontinuous. Empire United Stevedores v. Gatlin, supra, at 822.

Claimant was a five-day per week worker and worked in the same employment for substantially the whole of the year immediately preceding the injury. Therefore, I find that Section 10(a) is the appropriate standard under which to calculate average weekly wage in this matter.

Claimant received pay for 50 of the 52 weeks immediately preceding her injury. Her earnings for the 52-week period immediately preceding injury on April 14, 2004, was $19,164.14, which represented a total of 1,749.5 hours including vacation and overtime hours paid. Her actual wage rate at the date of injury was $11.53 per hour.

Section 10(a) computes Claimant's average weekly wage by multiplying her average daily wage rate by 260 and dividing the total by 52.

Claimant's average daily wage rate is $87.63 calculated as follows: Total hours paid (1,749.5), divided by 8 hours per day yields 218.7 days; Claimant's earnings of $19,164.14 divided by 218.7 days results in a daily wage of $87.63.

Claimant's average daily wage ($87.63) multiplied by 260 equals $22,783.80, divided by 52 weeks equals $438.15. Accordingly, I find that Claimant's average weekly wage is $438.15.

F. Entitlement to Medical Care and Benefits

Section 7(a) of the Act provides that:

> The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

33 U.S.C. § 907(a).

The Employer is liable for all medical expenses which are the natural and unavoidable result of the work injury. For medical expenses to be assessed against the Employer, the

expense must be both reasonable and necessary. Pernell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must also be appropriate for the injury. 20 C.F.R. § 702.402.

A claimant has established a **prima facie** case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-258 (1984).

Section 7 does not require that an injury be economically disabling for claimant to be entitled to medical benefits, but only that the injury be work-related and the medical treatment be appropriate for the injury. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 187.

Entitlement to medical benefits is never time-barred where a disability is related to a compensable injury. Weber v. Seattle Crescent Container Corp., 19 BRBS 146 (1980); Wendler v. American National Red Cross, 23 BRBS 408, 414 (1990).

An employer is not liable for past medical expenses unless the claimant first requested authorization prior to obtaining medical treatment, except in the cases of emergency, neglect or refusal. Schoen v. U.S. Chamber of Commerce, 30 BRBS 103 (1997); Maryland Shipbuilding & Drydock Co. v. Jenkins, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979), rev'g 6 BRBS 550 (1977). Once an employer has refused treatment or neglected to act on claimant's request for a physician, the claimant is no longer obligated to seek authorization from employer and need only establish that the treatment subsequently procured on his own initiative was necessary for treatment of the injury. Pirozzi v. Todd Shipyards Corp., 21 BRBS 294 (1988); Rieche v. Tracor Marine, 16 BRBS 272, 275 (1984).

The employer's refusal need not be unreasonable for the employee to be released from the obligation of seeking his employer's authorization of medical treatment. See generally 33 U.S.C. § 907 (d)(1)(A). Refusal to authorize treatment or neglecting to provide treatment can only take place after there is an opportunity to provide care, such as after the claimant requests such care. Mattox v. Sun Shipbuilding & Dry Dock Co., 15 BRBS 162 (1982). Furthermore, the mere knowledge of a claimant's injury does not establish neglect or refusal if the claimant never requested care. Id.

Having found that the injury to Claimant's heel was causally related to her compensable injury, I find that Employer is liable for Claimant's emergency treatment to her heel as well as medical care and treatment for her compensable knee and ankle injuries.

V. SECTION 14(e) PENALTY

Section 14(e) of the Act provides that if an employer fails to pay compensation voluntarily within 14 days after it becomes due, or within 14 days after unilaterally suspending compensation as set forth in Section 14(b), the Employer shall be liable for an additional 10% penalty of the unpaid installments. Penalties attach unless the Employer files a timely notice of controversion as provided in Section 14(d).

In accordance with Section 14(b), Claimant was owed compensation on the fourteenth day after Employer was notified of her injury or compensation was due.[3] Thus, Employer was liable for Claimant's temporary total disability compensation payment on April 28, 2004. Since Employer controverted Claimant's right to compensation, Employer had an additional fourteen days within which to file with the District Director a notice of controversion. Frisco v. Perini Corp. Marine Div., 14 BRBS 798, 801, n. 3 (1981). A notice of controversion should have been filed by May 12, 2004, to be timely and prevent the application of penalties. Consequently, I find and conclude that Employer filed a timely notice of controversion on April 24, 2004, and is not liable for Section 14(e) penalties.

VI. INTEREST

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. Avallone v. Todd Shipyards Corp., 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered

[3] Section 6(a) does not apply since Claimant suffered his disability for a period in excess of fourteen days.

a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that ". . . the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." Grant v. Portland Stevedoring Company, et al., 16 BRBS 267 (1984).

Effective February 27, 2001, this interest rate is based on a weekly average one-year constant maturity Treasury yield for the calendar week preceding the date of service of this Decision and Order by the District Director. This order incorporates by reference this statute and provides for its specific administrative application by the District Director.

VII. ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision by the District Director to submit an application for attorney's fees.[4] A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

VIII. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Employer shall pay Claimant compensation for temporary total disability from April 14, 2004 to July 31, 2005, based on

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[4] Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge compensates only the hours of work expended between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. Revoir v. General Dynamics Corp., 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of the Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. Miller v. Prolerized New England Co., 14 BRBS 811, 813 (1981), aff'd, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after **July 8, 2005**, the date this matter was referred from the District Director.

Claimant's average weekly wage of $438.15, in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. § 908(b).

2. Employer shall pay Claimant compensation for permanent total disability from August 1, 2005, to present and continuing thereafter based on Claimant's average weekly wage of $438.15, in accordance with the provisions of Section 8(a) of the Act. 33 U.S.C. § 908(a).

3. Employer shall pay to Claimant the annual compensation benefits increase pursuant to Section 10(f) of the Act effective October 1, 2005, for the applicable period of permanent total disability.

4. Employer shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's April 14, 2004 work injury, consistent with this decision, pursuant to the provisions of Section 7 of the Act.

5. Employer shall receive credit for all compensation heretofore paid, as and when paid.

6. Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982); Grant v. Portland Stevedoring Co., et al., 16 BRBS 267 (1984).

7. Claimant's attorney shall have thirty (30) days from the date of service of this decision by the District Director to file a fully supported fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days to file any objections thereto.

ORDERED this 10th day of January, 2007, at Covington, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge